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7
8 UNITED STATES DISTRICT COURT
9 FOR THE WESTERN DISTRICT OF WASHINGTON

WASHINGTON TOXICS COALITION,)	
NORTHWEST COALITION FOR)	Civ. No. C01-0132C
ALTERNATIVES TO PESTICIDES,)	
PACIFIC COAST FEDERATION OF)	
FISHERMEN'S ASSOCIATIONS, and)	PLAINTIFFS' NOTICE OF FILING IN
INSTITUTE FOR FISHERIES RESOURCES,)	RESPONSE TO OBJECTIONS OF
)	INTERVENOR-DEFENDANTS AND
Plaintiffs,)	FEDERAL DEFENDANTS TO
)	PLAINTIFFS' PROPOSED ORDER
v.)	GRANTING FURTHER INJUNCTIVE
)	RELIEF
ENVIRONMENTAL PROTECTION)	
AGENCY, and CHRISTINE TODD)	
WHITMAN, ADMINISTRATOR,)	
)	
Defendants,)	
)	
AMERICAN CROP PROTECTION)	
ASSOCIATION, et al.,)	
)	
Intervenor-Defendants.)	

21 Plaintiffs, Washington Toxics Coalition, et al. (the "Toxics Coalition"), submit this
22 response to clarify four factual errors in the December 19 and December 20, 2003 filings of the
23 Intervenor-Defendants' and Federal Defendants' Objections to Plaintiff's Proposed Order
24 Granting Further Injunctive Relief. Plaintiffs filed their Proposed Order on December 15, 2003.

25 PLAINTIFFS' NOTICE OF FILING IN RESPONSE TO
26 OBJECTIONS TO PLAINTIFFS' PROPOSED ORDER
GRANTING FURTHER INJUNCTIVE RELIEF (C01-0132C) - 1 -

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1 1. Both the Intervenor-Defendants (¶ 12) and the Federal Defendants (¶ 2)
2 erroneously argue that the record lacks evidence to support the Toxics Coalition's statement, in
3 Paragraph III.D.2 (pages 9-10) of its Proposed Order, that NMFS routinely requires certain
4 safeguards when applying pesticides for the control of noxious weeds. To the contrary, as the
5 Toxics Coalition informed the parties and the Court in its Notice of Filing Proposed Order dated
6 October 2, 2003, the safeguards NMFS routinely requires in ESA Section 7 consultations on
7 noxious weed programs to protect listed salmonids are evident in two Biological Opinions
8 discussed in Paragraphs 5 and 6 of the Fourth Declaration of Aimee Code, dated May 30, 2003,
9 which cite to 1) the ESA § 7 Consultation Biological Opinion re: Travis Tyrrell Seed Orchard
10 (Dec. 18, 2002) ([http://www.nwr.noaa.gov/1publcat/bo/2002/200201273_travis_tyrrell_12-18-](http://www.nwr.noaa.gov/1publcat/bo/2002/200201273_travis_tyrrell_12-18-2002.pdf)
11 [2002.pdf](http://www.nwr.noaa.gov/1publcat/bo/2002/200201273_travis_tyrrell_12-18-2002.pdf)), and 2) the ESA § 7 Consultation Biological Opinion re: Effects of Herbicide
12 Treatment of Noxious Weeds on Lands Administered by the Salmon-Challis National Forest
13 (Sept. 16, 2002) ([http://www.nwr.noaa.gov/1publcat/bo/2002/2002_herbicide_200200390_09-](http://www.nwr.noaa.gov/1publcat/bo/2002/2002_herbicide_200200390_09-16-2002.pdf)
14 [16-2002.pdf](http://www.nwr.noaa.gov/1publcat/bo/2002/2002_herbicide_200200390_09-16-2002.pdf)). Drawing from these Biological Opinions, there is ample record evidence for the
15 Court to order, as Plaintiffs have proposed, that noxious weed programs should "implement the
16 following safeguards that NMFS routinely requires for such programs." Plaintiffs' Proposed
17 Orders dated Oct. 2., 2003 and Dec. 15, 2003 at ¶ III.D.2. See also Dec. 9 Tr. at 8 ("The
18 defendants and plaintiffs disagree on noxious weed programs. I propose to accept the plaintiffs'
19 proposal in that regard.").

20 2. The Court did not indicate at the December 9, 2003 status conference, as Federal
21 Defendants argue (¶ 1), that Plaintiffs should use the definition for "Salmon Supporting Waters"
22 as supplied by the Defendants. To the contrary, the Court adopted many of the Plaintiffs'
23 proposals for that definition, and clarified that "Salmon Supporting Waters": 1) included
24 estuaries; 2) should be measured from the ordinary high water mark; 3) applied to waters where

1 salmon are “ordinarily found”; and 4) should include references, for Washington and Oregon, to
2 the Streamnet database, and for California, to the USGS stream maps.

3 3. As the Court clarified at the December 9, 2003 status conference, “Salmon
4 Supporting Waters” should be defined to include all waters where “salmon are ordinarily found,”
5 which includes intermittent streams. Dec. 9 Tr. at 2. The argument of Intervenor-Defendants
6 (¶ 2) that intermittent streams should be excluded from the order is inconsistent with the Court’s
7 intent that the injunction apply to streams that ordinarily support salmon, even if those streams
8 are dry at certain times of the year.

9 4. Intervenor-Defendants mistakenly argue to the Court (¶ 14) that the Toxics
10 Coalition’s proposed exclusion from injunctive relief for bensulide (¶ III.C.2) should be revised
11 because it is based on *Intervenors’* submittal. Rather, as Plaintiffs’ Proposed Order clearly
12 points out, the exception is based on EPA’s effects determinations, is accurate as stated, and
13 should not be revised. Plaintiffs’ [Proposed] Order Granting Further Injunctive Relief, Dec. 15,
14 2003, ¶ III.C.2.

15 Respectfully submitted this 22nd day of December, 2003.

17 /s/ Amy Williams-Derry
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